

## **EXHIBIT 15**

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PATRICK DAUGHERTY,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2017-0488-MTZ
HIGHLAND CAPITAL MANAGEMENT, L.P.,	:	
HIGHLAND EMPLOYEE RETENTION ASSETS	:	
LLC, HIGHLAND ERA MANAGEMENT LLC, and	:	
JAMES DONDERO,	:	
	:	
Defendants,	:	
	:	
and	:	
	:	
HIGHLAND EMPLOYEE RETENTION ASSETS	:	
LLC,	:	
	:	
Nominal Defendant.	:	

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Chancery Courtroom No. 12D  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware  
Friday, May 17, 2019  
1:30 p.m.

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BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

- - -

RULINGS OF THE COURT ON PLAINTIFF'S MOTION TO COMPEL  
AND MOTIONS FOR COMMISSIONS  
ORAL ARGUMENT AND RULINGS OF THE COURT ON PLAINTIFF'S  
MOTION FOR STATUS QUO ORDER AND DEFENDANTS' MOTION TO  
DISMISS COUNT IX OF SECOND AMENDED VERIFIED COMPLAINT

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CHANCERY COURT REPORTERS  
Leonard L. Williams Justice Center  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801  
(302) 255-0533

1 APPEARANCES:

2 THOMAS A. UEBLER, ESQ.  
3 JOSEPH L. CHRISTENSEN, ESQ.  
4 McCollom D'Emilio Smith Uebler LLC  
for Plaintiff

5 JOHN L. REED, ESQ.  
6 DLA Piper LLP (US)  
-and-  
7 MARC D. KATZ, ESQ.  
of the Texas Bar  
8 DLA Piper LLP (US)  
for Defendants

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1 THE COURT: Good afternoon. Please be  
2 seated.

3 First I wanted to acknowledge, we have  
4 an honored guest with us today. We have the Honorable  
5 Essam Yahyaoui, who is a judge from Tunisia. He  
6 presides over the commercial chamber of Tunisia's  
7 First Instance Court. So he's here to observe with  
8 his colleagues.

9 Welcome, sir.

10 All right. I'm going to start with  
11 the motion to compel, and then we'll move on to the  
12 motion for commission. And then there may be  
13 questions, and maybe take a break and regroup and we  
14 can move on with the other motions.

15 I'm going to grant Daugherty's motion  
16 to compel in part. For simplicity, I'm going to refer  
17 to Abrams & Bayliss as A&B. And I see four categories  
18 of documents at issue here. The first is regarding  
19 the initiation, negotiation, and establishment of A&B  
20 as Highland's escrow agent. The second is regarding  
21 A&B's legal work during the pendency of the Texas  
22 action to determine whether and how Daugherty might  
23 access the escrowed assets. The third is A&B's work  
24 responding to the Texas subpoena. And the fourth is

1 documents regarding A&B's resignation as Highland's  
2 escrow agent.

3 I grant the motion to compel as to  
4 Categories 1, 2, and 4 for one of two reasons.

5 The first reason is unfortunately my  
6 *in camera* review confirmed Daugherty's fear that  
7 Highland is improperly withholding documents in  
8 Categories 1 and 4 illustrating A&B's service and  
9 resignation as escrow agent, which are nonprivileged  
10 materials.

11 In a hearing on September 18, 2018,  
12 concerning an earlier subpoena, Vice Chancellor  
13 Glasscock stated that "... information regarding the  
14 actions of Abrams & Bayliss in connection with its  
15 operation of the escrow as agents of Highland, HERA,  
16 those documents, that information is relevant, and it  
17 doesn't appear to me to be generally privileged."  
18 That's a quote from the transcript.

19 Highland has been adamant that it was  
20 only withholding documents that implicated its role as  
21 legal counsel, and not in its role as escrow agent.  
22 For example, on page 28 of the transcript from the  
23 April 12th argument, Highland's counsel stated that,  
24 "We do not assert any privilege based solely on Abrams

1 & Bayliss's roles as escrow agents. It's purely  
2 because they have the dual roles both as escrow agents  
3 and also legal counsel, that when they were in the  
4 capacity of legal counsel, those communications were  
5 privileged."

6 At that argument, I requested the  
7 documents and stated I would review them *in camera*. I  
8 expressed my frustration that I had already given  
9 Highland multiple chances, and invited it to redo its  
10 privilege log for a final time.

11 In reviewing the documents, I  
12 concluded that more than 70 documents that were  
13 withheld based on claims of privilege or work product  
14 protection were improperly withheld. Those documents  
15 were Privilege Log No. 1 through 25, 27 through 29,  
16 35, 36, 41, 54, 56, 62, 85 through 87, and 336 through  
17 372.

18 This represents nearly 20 percent of  
19 the 372 documents in the log. But even that doesn't  
20 tell the full story, because more than 200 of the  
21 listed documents were simply attachments to e-mails  
22 collecting documents in response to the Texas  
23 subpoena. Excluding those, more than 50 percent of  
24 the documents listed were improperly withheld as

1 privileged.

2 Documents regarding A&B's nonlegal  
3 work and resignation as escrow agent are not  
4 privileged or work product because when A&B agreed to  
5 be an escrow agent, it stepped into a nonlegal role  
6 despite its status as a law firm.

7 The cases are clear on that point.  
8 *Northeast Credit Union v. CUMIS*: "It is well  
9 understood ... that the services of an escrow agent,  
10 even when that escrow agent is an attorney, are not  
11 legal services." *CCS Associates v. Altman*: "[C]ourts  
12 have specifically held that an attorney in the role of  
13 escrow agent does not transform communications  
14 pertaining to the administration of the escrow account  
15 into privileged documents." The first case is from  
16 the District of New Hampshire, and the second one is  
17 from the Eastern District of Pennsylvania.

18 These non-Delaware decisions more  
19 specifically enunciate a principle common in our own  
20 law. Including an attorney, or having an attorney  
21 perform nonlegal work, does not attach the privilege  
22 to the communications or the work. That is because  
23 "... the attorney-client privilege protects legal  
24 advice only, [and] not business or personal advice."

1 That's a quote from *MPEG v. Dell* from this court in  
2 2013.

3 And as Vice Chancellor Laster said in  
4 the *Facebook Class C Reclassification* litigation,  
5 "Making the lawyer the point person creates a pretext  
6 for invoking the attorney-client privilege, but it is  
7 only a pretext." That's from his December 12th, 2016  
8 order in Case No. 12286-VCL.

9 Categories 1 and 4 reflect  
10 communications between A&B and Highland concerning the  
11 start of the escrow relationship, or A&B resigning as  
12 escrow agent. To be sure, there were legal  
13 ramifications and issues regarding the work A&B was  
14 doing in setting up and then ending the escrow  
15 relationship. But any legal component of A&B's  
16 escrow-related work was secondary to the role as  
17 escrow agent. A&B was a contractual counterparty with  
18 Highland under the escrow agreement, and each had  
19 obligations under that agreement.

20 A&B did perform legal work on the  
21 escrow issue. For example, A&B attorneys analyzed  
22 what document 351 on the log calls the "HERA  
23 Strategy." But that legal advice was not for the  
24 benefit of Highland, who was A&B's contractual

1 counterparty. A&B could potentially claim that its  
2 attorneys were providing legal services to A&B as  
3 escrow agent. But that is not what is before me; A&B  
4 has claimed no privilege. The only issue is whether  
5 Highland can claim a privilege and withhold the  
6 communications containing A&B's legal analysis  
7 regarding its service as escrow agent.

8 I think an example here might be  
9 helpful. If Highland had retained a bank or other  
10 repository to act as escrow agent rather than a law  
11 firm, the result would be more clear. If the  
12 employees of that non-law firm escrow agent  
13 communicated internally about the relationship or the  
14 contract, it would not be privileged.

15 If those employees received legal  
16 advice from attorneys about how to structure the  
17 escrow, what the terms of the escrow agreement meant,  
18 or how it could fulfill Highland's request to unwind  
19 the escrow and transfer the assets back, Highland  
20 could not claim that the in-house or outside counsel  
21 retained by the escrow agent was providing legal  
22 advice for Highland's benefit. It would be much  
23 clearer that the attorneys were providing legal advice  
24 to, and for the benefit of, the escrow agent, not its

1 contractual counterparty, Highland.

2           The facts here are more muddled  
3 because there are only lawyers involved because  
4 Highland selected a law firm, that otherwise  
5 represented Highland, to act as escrow agent. But the  
6 result should be the same. A&B's privilege over its  
7 in-house advice regarding its conduct under the escrow  
8 agreement does not belong to Highland just because A&B  
9 is itself Highland's attorney.

10           The next question is one of remedy for  
11 improperly withholding so many of the documents as  
12 privileged. Waiver "... has been characterized as a  
13 'harsh result' typically only justified 'in cases of  
14 the most egregious conduct by the party claiming the  
15 privilege.'" That's from *TCV v. TradingScreen*.

16           "If a party falls substantially short  
17 of the well-established requirements, then waiver is  
18 an appropriate consequence that helps dissuade parties  
19 from engaging in dilatory tactics." That's from  
20 *Mechel Bluestone v. James C. Justice Companies*.

21           Daugherty has been dogged in his  
22 pursuit of these documents, and Highland was just as  
23 resolute in refusing to produce them. Vice Chancellor  
24 Glasscock said last September these types of documents

1 are not privileged. I gave Highland multiple  
2 opportunities to address this. Because Highland stuck  
3 by its position and continued to assert such a large  
4 percentage of improper privilege assertions while  
5 claiming it was producing documents concerning A&B's  
6 role as escrow agent, any privilege related to that  
7 topic is waived, and a full waiver of Highland's  
8 privilege could be an appropriate consequence.

9 But I am reluctant to go that far  
10 because Categories 2 and 3 were properly withheld and  
11 logged adequately. Category 2 relates to a memorandum  
12 A&B prepared analyzing avenues available for Daugherty  
13 to pursue the escrowed assets. This work started in  
14 February 2014. Category 3 relates to efforts to  
15 collect documents in response to the subpoena for the  
16 Texas case. I conclude Highland's unjustified  
17 withholding of other documents related to the escrow  
18 was not so egregious as to waive any privilege over  
19 these two sets of documents.

20 This brings me to the crime-fraud  
21 exception. If Categories 1 and 4 were privileged, I  
22 would conclude that the crime-fraud exception applies  
23 and so A&B should produce those documents regardless.  
24 I reach the same conclusion for Category 2, the subset

1 of documents related to A&B's 2014 memorandum that  
2 were privileged and properly logged.

3 Rule of Evidence 502(d)(1) says that  
4 "There is no privilege ... If the services of the  
5 lawyer were sought or obtained to enable or aid anyone  
6 to commit or plan to commit what the client knew or  
7 reasonably should have known to be a crime or fraud."

8 To fall within this exception, "... a  
9 mere allegation of fraud is not sufficient; there must  
10 be a prima facie showing that a reasonable basis  
11 exists to believe a fraud has been perpetrated or  
12 attempted." That's from *Princeton Insurance Company*  
13 *v. Vergano*. That case also explains that "... when a  
14 client seeks out an attorney for the purpose of  
15 obtaining advice that will aid the client in carrying  
16 out a crime or a fraudulent scheme, the client has  
17 abused the attorney-client relationship and stripped  
18 that relationship of its confidential status."

19 The client must intend the  
20 communications to be used as a bases for the fraud.  
21 "The advice must advance, or the client must intend  
22 the advice to advance the client's ... fraudulent  
23 purpose." That's from *Buttonwood Tree Partners v.*  
24 *R.L. Polk*.

1                   As Chief Justice Strine wrote while  
2 Vice Chancellor in *Princeton Insurance v. Vergano*,  
3 "The quintessential circumstance [when this exception  
4 applies] is when the client obtains the advice of the  
5 lawyer in order to help shape a future course of  
6 criminal or fraudulent activity. This is the classic  
7 situation when the privilege gives way, as the  
8 societal purpose of the confidential relationship has  
9 been entirely subverted, with the client seeking the  
10 expertise of someone learned in the law not so as to  
11 comply with the law or mitigate legitimately the  
12 consequences of his prior behavior, but to craft a  
13 course of future unlawful behavior in the most  
14 insidiously effective manner."

15                   Here, there is a reasonable basis to  
16 believe a fraud has been perpetrated. Daugherty's  
17 claim for fraudulent conveyance survived a motion to  
18 dismiss, and I will refer the parties to Vice  
19 Chancellor Glasscock's January 16, 2018 opinion on  
20 that point.

21                   The question is whether Highland  
22 sought the services of attorneys to enable or aid it  
23 in furtherance of that fraud. I believe there is a  
24 reasonable basis to believe that as well. Highland's

1 attorney at Andrews Kurth contacted A&B almost  
2 immediately after the Texas judgment became final and  
3 nonappealable. That's at Exhibit K.

4 Highland claims A&B then provided it  
5 legal advice interpreting the escrow agreement, and  
6 A&B resigned as escrow agent intending to cause, and  
7 in fact causing, the assets to return to  
8 Highland/HERA. That is the transfer that Daugherty  
9 claims was fraudulent.

10 This was not the first legal work A&B  
11 performed in pursuit of keeping the escrowed assets  
12 from Daugherty. Starting in February 2014, it  
13 analyzed Daugherty's ability to get at the assets  
14 while the appeal was pending. Because that appears to  
15 be the beginning of the efforts that culminated in the  
16 allegedly fraudulent acts, the crime-fraud exception  
17 strips the privilege from these documents.

18 Daugherty has made a *prima facie*  
19 showing that a reasonable basis exists to believe that  
20 a fraud has been perpetrated, and that Highland sought  
21 A&B to serve as escrow agent and to provide legal  
22 analysis in furtherance of that fraud; specifically,  
23 to protect the escrowed assets from Daugherty while  
24 the Texas case was pending, and then to transfer them

1 back to Highland after the Texas verdict was  
2 finalized. I conclude any privilege Highland claims  
3 over A&B's legal advice regarding the escrow  
4 arrangement and A&B's resignation has been stripped  
5 under the crime-fraud exception.

6 I want to be clear on what I am not  
7 saying. I am not saying that a fraud claim merely  
8 surviving a motion to dismiss permits the supposed  
9 victim to invade the defendant's privilege for any  
10 legal advice the defendant received in regards to the  
11 underlying transaction or act. This is a unique case  
12 in which it presently appears that the law firm that  
13 provided the legal advice, one, was a contractual  
14 counterparty to the defendant in the very contract  
15 under which the fraudulent transfer was allegedly  
16 made; two, provided legal advice interpreting that  
17 agreement and charting the course for the transfer;  
18 and, three, implemented its own advice to effectuate  
19 the transfer.

20 On these allegations, which are  
21 supported by the documents I have reviewed, it appears  
22 the defendant sought the firm's legal advice to  
23 further the alleged fraud based on the terms of the  
24 contract to which the defendant and the firm were

1 parties. Based on these uncommon facts, the  
2 crime-fraud exception applies here.

3 Accordingly, the privilege is either  
4 nonexistent or waived as I just described for  
5 Categories 1, 2, 4; in other words, all documents  
6 regarding A&B's service as escrow agent. The  
7 crime-fraud exception also applies to documents in  
8 these categories designated as work product, under  
9 *Playtex v. Columbia* out of the Superior Court.

10 I find that Category 3, regarding the  
11 Texas subpoena, was properly logged as privileged, and  
12 that the crime-fraud exception does not reach those  
13 documents. Daugherty has not alleged that the  
14 subpoena response was in furtherance of the fraud.  
15 Category 3 comprises the families associated with  
16 lines 91 through 327, which are the parent e-mails  
17 attaching documents collected in response to a  
18 subpoena.

19 Mr. Katz, is any of that unclear?

20 MR. KATZ: No, Your Honor. It's  
21 clear.

22 THE COURT: Mr. Uebler, any questions?

23 MR. UEBLER: No questions, Your Honor.  
24 Thank you.

1 THE COURT: Thank you.

2 We'll turn to the motion for  
3 commissions.

4 Daugherty seeks commissions to take  
5 the depositions of James C. Bookhout and Marc D. Katz,  
6 both of DLA Piper. I will refer to Mr. Bookhout and  
7 Mr. Katz collectively as "the requested deponents."  
8 Both requested deponents represented Highland in its  
9 dispute with Daugherty in Texas, beginning in 2012,  
10 and Mr. Katz and his colleagues at DLA represent  
11 Highland in this action as well. Daugherty seeks fact  
12 testimony from the requested deponents on five topics,  
13 all pertaining to the events surrounding the escrow as  
14 alleged in Daugherty's operative complaint.

15 The discovery Daugherty seeks is  
16 clearly within the bounds of Court of Chancery  
17 Rule 26. And, based on the privilege log Highland  
18 produced for the escrow-related documents, the  
19 requested deponents have personal knowledge of at  
20 least some of the escrow events.

21 The parties disagree on the threshold  
22 standard for evaluating whether counsel can be  
23 deposed. Highland contends this court has adopted the  
24 *Shelton* test, while Daugherty points to a series of

1 standards from *Rainbow Navigation*, *Sealy Mattress*,  
2 *Kaplan & Wyatt*, and *Dart*.

3 I note that in a transcript ruling  
4 from 2018 in *LendUS, LLC v. Goede*, Vice Chancellor  
5 Glasscock considered in the first instance whether it  
6 was necessary to gather the evidence sought from  
7 counsel, given the risk of disqualification. I agree  
8 this is a threshold consideration present in all the  
9 cases the parties have cited. And I conclude, like  
10 Vice Chancellor Glasscock did in *LendUS*, that  
11 Daugherty has not made a sufficient showing that he  
12 needs to depose Mr. Bookhout and Mr. Katz at this  
13 juncture.

14 As I just explained in my ruling on  
15 Daugherty's motion to compel, Daugherty will receive  
16 A&B's documents regarding the escrow. Daugherty can  
17 also depose the escrow agents. He can depose the  
18 Highland principals who were involved. And I do not  
19 see that any of this has happened yet. He should  
20 pursue those avenues before pursuing one that  
21 jeopardizes Highland's choice of counsel. His motions  
22 for commission for the proposed deponents are denied  
23 without prejudice.

24 I am mindful that trial is scheduled

1 for September, and that -- if Daugherty renews his  
2 motions after taking the rest of the fact discovery --  
3 the risk of disqualification carries more prejudice to  
4 Highland the closer we get to trial. I also note that  
5 the discovery cutoff in this case is June 28, 2019. I  
6 am, therefore, interspersing an intermediate discovery  
7 cutoff.

8 Escrow discovery, including  
9 depositions of fact witnesses other than the requested  
10 deponents, must be complete by June 14th, 2019, and  
11 Daugherty must make any renewed motion for commission  
12 by June 17, 2019, with briefing on that motion to be  
13 expedited.

14 The burden this timeframe places on  
15 both parties I think is appropriate in light of the  
16 requested deponents' apparent knowledge of significant  
17 aspects of Daugherty's allegations, and in light of  
18 the desire to protect Highland's choice of counsel.  
19 Any renewed motion by Daugherty must demonstrate what  
20 gaps in the record he needs to fill, and why he  
21 believes the requested deponents can fill those gaps.

22 Mr. Uebler, is any of that unclear?

23 MR. UEBLER: Your Honor, nothing is  
24 unclear about that ruling, but I do have a question

1 about the escrow agent depositions. Can the parties  
2 assume that the ruling that the Court has made with  
3 respect to the documents will also apply to deposition  
4 testimony? in other words, categories that may be  
5 subject to privilege such as the subpoena response,  
6 but all other escrow-related categories would  
7 presumably be fair game and not subject to privilege  
8 in a deposition?

9 THE COURT: That's correct, at least  
10 as to A&B. I note that we haven't really tested the  
11 boundaries of where my ruling might go with regard to  
12 DLA. And I think that's probably another conversation  
13 we would need to have.

14 MR. UEHLER: Understood. Thank you.

15 THE COURT: Thank you.

16 Mr. Katz, is any of that unclear?

17 MR. KATZ: No, Your Honor. That's  
18 clear.

19 THE COURT: I'll give you-all maybe  
20 ten minutes to kind of regroup a little bit, and then  
21 I'll hear the motion for status quo order first.

22 We're in recess.

23 (Recess taken from 1:53 p.m. until 2:00 p.m.)

24 THE COURT: Mr. Uebler?

1 MR. UEHLER: Your Honor, my colleague,  
2 Mr. Christensen, is going to argue the status quo  
3 motion. But I'd just like to point out, we had an  
4 issue with our File & Serve converting Word documents  
5 to pdf, and it would drop the occasional citation in  
6 footnotes. I don't know if it's our system or theirs.  
7 But, in any event, we've brought revised copies of our  
8 papers with all the citations for the Court.

9 THE COURT: Thank you.

10 MR. UEHLER: You're welcome.

11 MR. CHRISTENSEN: Good afternoon, Your  
12 Honor. Joseph Christensen from McCollom D'Emilio for  
13 the plaintiff, Pat Daugherty.

14 I just want to start very briefly with  
15 how we got here. Your Honor is familiar with the  
16 facts, so I won't go over that in too much detail.  
17 But I do want to highlight some of the additional  
18 points that we included in our briefing related to  
19 what Highland was saying about these assets during the  
20 Texas action.

21 So Thomas Surgent, during the Texas  
22 action, he was the chief compliance officer of  
23 Highland. During the Texas action, he testified that  
24 the assets listed in the escrow agreement were being

1 held for Pat's benefit for his interest in HERA.

2 These are all from Exhibit V. That one is at page 15  
3 of 53.

4 Jim Dondero, the head of Highland,  
5 testified that Pat's share of all the assets,  
6 including the cash, is in escrow. He also testified  
7 that Pat's *pro rata* share of all the assets, including  
8 the cash, are all sitting in escrow. There's been  
9 nothing deducted or removed from Pat's account. And  
10 he also said that the escrow agreement was to protect  
11 Pat Daugherty.

12 The point of all these statements was  
13 to convince everybody who would listen that these  
14 assets were being held for Pat Daugherty, and that if  
15 he prevailed in the Texas action, he would obtain  
16 those assets. And we haven't done anything with them.  
17 We haven't offset any legal expenses, which is also  
18 noted in our reply brief.

19 Coupled with the statements that Pat  
20 continued to hold the HERA units, this was a clear  
21 expression that Highland was trying to convince people  
22 that they intended to hold onto these assets but give  
23 them to Pat if he prevailed in the Texas action.

24 In HERA's closing argument its counsel

1 said, "If Pat Daugherty happens to prevail in his  
2 lawsuit against Lane, Patrick and HERA you heard Jim  
3 Dondero testify he gets his interest, which is  
4 currently escrowed in the third-party escrow account,  
5 all of it."

6 And the jury clearly believed that the  
7 escrow meant to preserve Daugherty's interest. One of  
8 the questions the jury sent back to the judge in the  
9 Texas action referred to his -- that is Pat's -- HERA  
10 units currently in escrow. That's the third to the  
11 last page in Exhibit U.

12 The defendants now say, "Well, sure,  
13 Pat continued to be an owner of HERA, but there was  
14 never anything in HERA, at least during the Texas  
15 action and before the Texas action." Which reminds me  
16 of a scene from my life at a movie theater with my two  
17 sons, where the younger one was complaining that his  
18 brother wouldn't give him the box of candy. He asked  
19 me to intervene, and I told him to give him the box of  
20 candy, at which point the older brother emptied the  
21 candy into his popcorn and gave him the empty box.

22 That's exactly what happened here.  
23 When they told everyone they were holding assets for  
24 Pat's benefit, they would now have you believe that

1 what they really meant was that he was just entitled  
2 to an empty box, and they had no intention -- and Pat  
3 should have known that they never had any intention of  
4 ever letting him have them.

5           There are two possibilities to explain  
6 the contrast between what they said during the Texas  
7 action and what they're saying now. One is that they  
8 knew at the time that they were never going to give  
9 them back. The other is that they believed at the  
10 time and were sincere in saying that they would give  
11 them back, but they later changed their mind.

12           Under either of those circumstances,  
13 Daugherty prevails on at least one of his claims. If  
14 they changed their mind but initially intended it, his  
15 promissory estoppel claim is very strong. If they  
16 never intended from the beginning to give them to him,  
17 then his fraud and unjust enrichment claims are  
18 equally strong. The status quo order should be  
19 entered to make sure that they can't do either of  
20 those things this time.

21           I think that's all the background we  
22 need, except for a clarification on what Daugherty is  
23 seeking. He is seeking those assets. His relief --  
24 Your Honor will note that we did not include in our

1 briefing any discussion of our claims for  
2 indemnification. Our indemnification claim is  
3 effectively a monetary relief sort of claim. But we  
4 did discuss promissory estoppel, unjust enrichment,  
5 and fraudulent transfer. Each one of those theories  
6 includes potential relief divesting those assets from  
7 whoever holds them, which brings me to the next point,  
8 which is that we do not know where these assets are.

9 We have asked the defendants where  
10 these assets are; were they ever transferred after  
11 December 2016. They told us they would not provide  
12 any information on those requests. And that's at our  
13 Exhibit L, Request No. 8 and 11, and Exhibit W, our  
14 Request No. 34 and 37.

15 THE COURT: I'm certainly not inviting  
16 more or different motions. But isn't the remedy for  
17 that a motion to compel instead of a motion for a  
18 status quo order?

19 MR. CHRISTENSEN: It would be. And we  
20 are not seeking through this status quo order  
21 effectively a back door to answering these requests  
22 for documents and interrogatories. But the fact that  
23 they will not tell us where these assets are is  
24 consistent with the prior behavior in the Texas action

1 and gives us a lot of pause about waiting until the  
2 end of this trial.

3               So we started out this case with -- I  
4 guess I should first turn to the defendants' argument  
5 that the Court doesn't have power to enter this status  
6 quo order. Clearly it does. The kind of relief that  
7 we're seeking is in aid of the ultimate relief that we  
8 are seeking. Because we are trying to obtain or move  
9 particular assets, we are seeking the status quo order  
10 to make sure those assets are still available for the  
11 court to issue an effective ruling at the end of this  
12 case.

13               THE COURT: And how do you get around  
14 the *Hillsboro* and *HEM* cases that discourage  
15 intermediate injunctive relief for the purpose of  
16 preserving assets?

17               MR. CHRISTENSEN: Well, I think  
18 generally the cases are referring to when you're  
19 seeking monetary relief. And that's not what we're  
20 doing in this case. And I think the history is  
21 probably the most important point in this situation.

22               One simply cannot ignore that the very  
23 assets and the very parties in this litigation -- the  
24 reason we're here is because we were chasing after

1 these assets that we believe we obtained the right to  
2 in the previous action. So it's a unique situation.  
3 None of the cases involve the same parties and the  
4 same assets.

5 And the cases -- even the cases that  
6 have history as a basis for granting the status quo  
7 order, none of them have this kind of sort of clear  
8 evidence that there was a fraud and moving of assets  
9 to defeat a judgment in an earlier iteration of the  
10 dispute between the parties.

11 THE COURT: And how does that sort of  
12 long history or long series of allegations of fraud  
13 and hiding assets, how does that square up with the  
14 requirement that the harm to be prevented by the  
15 status quo order be imminent?

16 MR. CHRISTENSEN: The imminence, Your  
17 Honor, to be frank, is probably the most difficult  
18 aspect of our situation to square with the law.  
19 Because -- in part because they haven't told us  
20 whether things have been transferred, where things  
21 are, we cannot give Your Honor very many facts about  
22 some imminent action that is going to take place.

23 But at the same time, we -- again, we  
24 started as a frog in a pot at a very high temperature

1 having come out of the experience in Texas. Then  
2 adding to that was the fact that they will not tell us  
3 where these assets are. They will not tell us whether  
4 they are currently in a solvent entity or not. They  
5 will not really just come out and say whether those  
6 assets are still in Highland or not. There's a  
7 suggestion in their brief that can be read as a  
8 representation that they are in the Highland and never  
9 have left, but they also make the argument in their  
10 brief that the assets never went over to Abrams &  
11 Bayliss; that during the whole time that Abrams &  
12 Bayliss was holding the assets, that really Highland  
13 held the assets, retained legal title, and Abrams &  
14 Bayliss was simply holding onto them in trust. We  
15 don't know if something like that is happening in this  
16 case either.

17 On top of that, we had -- and what  
18 spurred us to action was the affidavit of Highland  
19 saying that they did not have current assets to  
20 satisfy the judgment in the *Crusader Redeemer* action.  
21 So that's on the front end of that judgment. We, at  
22 this point, don't know what Highland is going to look  
23 like from a solvency standpoint on the back end of  
24 that after those assets have gone out the door, and so

1 at some point we have to act. We need to act before  
2 the end of this case.

3 We didn't believe that we had enough  
4 imminence at the beginning of this case that we would  
5 get a status quo order or a preliminary injunction.  
6 But when they filed that affidavit saying that in a  
7 cash flow basis they were insolvent for purposes of  
8 satisfying a judgment, against the backdrop of all the  
9 history, it starts to look like we're doing a replay  
10 of what happened in Texas.

11 Your Honor referred to, I think, a  
12 memo from Abrams & Bayliss talking about the HERA  
13 strategy. And what we're afraid of is that there is a  
14 HERA Strategy Version 2 that we do not know about  
15 right now and they just won't tell us. So at some  
16 point, in order to avoid them doing the same thing  
17 again, we have to act. We can't, unfortunately,  
18 identify when they're going to do that in the same  
19 clean kind of way that one often can in a status quo  
20 or preliminary injunction case. But the danger, I  
21 would submit, is just as high as in those cases.

22 I've talked some about the history.  
23 And the defendants do talk about three of the cases  
24 that we talked about regarding the history. They

1 address the *Crusader Redeemer* action that Your Honor  
2 is familiar with, the *UBS* litigation, and the *Acis*.  
3 The ones that they don't mention are *Trussway*, for  
4 example.

5 *Trussway*, in this court under Vice  
6 Chancellor Glasscock, he actually already found that  
7 the kind of history that one would have to establish  
8 to obtain a status quo order was found with respect to  
9 these principals. He said he took into account the  
10 "... prior history of the controllers of the entities  
11 in examining equitable matters that come before us."  
12 And true to the way he is, he said, "... I would just  
13 as soon not list all the reasons I have that make me  
14 suspicious that a remedy will not be available here  
15 ...." "But I think it suffices to say that I have  
16 experience with other cases involving the principals  
17 here." And he went on. That's from page 40 of  
18 Exhibit S, which is the transcript in the *Trussway*  
19 action.

20 On the next page he said that, "...  
21 given ... some of the factors that I've mentioned,  
22 including the *Acis* bankruptcy and my other experiences  
23 with the principals here ... there is a reasonable  
24 probability that without some action, any victory will

1 be a Pyrrhic victory."

2 THE COURT: It sounds like what you're  
3 suggesting is that given the track record of Highland  
4 in this action and in other actions, that you're  
5 suggesting that the imminence requirements be  
6 dispensed with because of what's going on here.

7 MR. CHRISTENSEN: I don't think I  
8 would say that, Your Honor. I would say that given  
9 the caginess on discovery, we are not able to identify  
10 the moment of imminence. But we are, through the  
11 history, able to establish the same point as  
12 imminence.

13 Imminence is this -- the point of  
14 addressing imminence is that if you don't address  
15 this, it is going to happen, and it's going to happen  
16 very soon. We can't tell you that it's going to  
17 happen very soon, but we can tell you that there's  
18 every reason to believe that it will happen before the  
19 end of this trial.

20 THE COURT: But what about the -- I  
21 think many times when one is considering imminence,  
22 there's sort of a *laches*-esque element that comes into  
23 it. And this case was filed in 2017. So this "it"  
24 that we're discussing very well may have already

1 happened.

2 And so I wonder what the justification  
3 is for sort of after the fact -- maybe, I don't  
4 know -- after the fact then seizing up Highland simply  
5 based on the way that things have played out in other  
6 cases.

7 MR. CHRISTENSEN: So I think I can  
8 explain why we didn't act earlier, and why it wouldn't  
9 have been justified to act earlier, and so why we  
10 shouldn't be subject to laches on this argument.

11 When we started, we had no reason to  
12 believe that those assets had gone anywhere other than  
13 Highland. Then the Acis bankruptcy discussed that  
14 Dondero was moving out tens of millions of dollars to  
15 his charitable foundation. That was another brick in  
16 the wall. Then we got the discovery responses that  
17 were not responsive.

18 And to be clear, we have not given up  
19 on that. We had a meet-and-confer as recently as this  
20 morning, and one on Friday of last week, in which we  
21 are trying to get these documents. It doesn't appear  
22 that we're going to have much success on our own. But  
23 we are absolutely pursuing that and have pursued those  
24 documents as vigorously as we pursued the Abrams &

1 Bayliss documents.

2 To mix the metaphors, the straw that  
3 broke the camel's back was the *Crusader Redeemer*  
4 action where Highland said: We cannot pay this  
5 judgment right now. We have more assets than  
6 liabilities, but we cannot pay this right now.

7 And it's also important to remember  
8 that it's not just large judgments that Highland has a  
9 history of not paying, and it's not only Daugherty's  
10 relatively small judgment that they refused to pay.  
11 But in the Acis bankruptcy, it was an \$8 million claim  
12 at issue, and they made him go through -- or are still  
13 going through involuntary bankruptcy.

14 So I think we acted when it was  
15 prudent to act. And before that occurred, I don't  
16 think any member of this court would have been likely  
17 to give us relief without something to point to, a  
18 reason to believe that Highland wouldn't pay apart  
19 from the history.

20 THE COURT: And the reason is that  
21 affidavit in the *Redeemer* case stating that Highland  
22 doesn't have the liquid assets to pay the \$175 million  
23 judgment? That's what you're interpreting to say that  
24 they will not pay or will somehow manage to avoid

1 paying Mr. Daugherty's -- what is allegedly owed to  
2 him?

3 MR. CHRISTENSEN: We aren't sure about  
4 the damages, but effectively, yes. That Highland --  
5 which is, we assume, the most solvent of any of the  
6 entities -- now has a cash flow solvency issue. And  
7 so at that point we felt we needed to act.

8 THE COURT: Understand.

9 MR. CHRISTENSEN: The other thing that  
10 I think Your Honor should consider, it doesn't fit  
11 exactly within the three factors of a status quo or a  
12 preliminary injunction standard; but I think Your  
13 Honor should also take into account that it may not be  
14 a question of whether or not Highland is able to  
15 satisfy the judgment, but whether it will, even if it  
16 is able.

17 THE COURT: That's what I'm wondering.  
18 That's the part that I'm wondering how that's being  
19 derived from the affidavit in the *Redeemer* case, if  
20 that's the precipitating factor. Am I understanding  
21 you to read that affidavit only to inform solvency and  
22 not intent?

23 MR. CHRISTENSEN: It is consistent  
24 with an intent to make people work for their

1 judgments, but I mostly consider it separately. And  
2 what I'm really referring to, the short name for it is  
3 spite. It appears, if you look, not only at the  
4 previous action in Texas, but also the Josh Terry  
5 situation, that a major factor motivating whether or  
6 not Highland pays judgments is how Highland feels or  
7 how Jim Dondero feels about the people who are trying  
8 to collect that judgment.

9 And so you have the court in the  
10 bankruptcy case in *Acis* said that the expenditures  
11 were out of whack versus what's at stake. Or in the  
12 *Credit Strategies Fund* case -- which the defendants  
13 did not address -- the factual findings there refer to  
14 some notes from a call between those parties and  
15 Dondero. Those notes read, "Dondero directly  
16 threatens Concord and Brant personally. We are very  
17 good at being spiteful."

18 And so that spite doesn't -- it's not  
19 one of the factors normally considered on a status quo  
20 motion or a preliminary injunction. I do think, as a  
21 matter of equity, Your Honor ought to consider that.  
22 And I think it's consistent with, and maybe grows out  
23 of the kind of considerations that Vice Chancellor  
24 Glasscock was taking into account in the *Trussway*

1 action.

2 I think I'll skip to likelihood of  
3 success on the merits. We do think the likelihood of  
4 success on the merits prong of this analysis is fairly  
5 straightforward. At a big-picture level, Daugherty  
6 had a claim on these assets, either directly or  
7 through HERA. He was entitled to that compensation,  
8 he earned it, and it was taken from him after he  
9 proved his entitlement not only to damages -- which he  
10 received in the amount of 2.6 million and has never  
11 seen, but also the underlying assets.

12 So for fraudulent transfer purposes,  
13 we think actual intent to hinder, delay, or defraud  
14 based on the documents that we have seen so far is  
15 compelling evidence that there was actual intent to  
16 hinder, delay, or defraud.

17 Your Honor only has to find that we  
18 have a reasonable probability of success on one of our  
19 claims. You do not have to decide that we have a  
20 reasonable probability of success on all of them. And  
21 that comes out of the *Destra Targeted Income* case.

22 But we also think our other claims are  
23 quite strong, the alternative bases under fraudulent  
24 transfer law. We do not believe that HERA got

1 equivalent value, for example, in the transfer.

2 Unjust enrichment, it's an equitable doctrine, so in  
3 some sense you back away and look at what really  
4 happened, what's the substance.

5           And again, what happened was Daugherty  
6 earned compensation, he proved his entitlement to it,  
7 and then it was taken from him. That enriched  
8 Highland; it impoverished Daugherty to the extent that  
9 he was entitled to it. There was obviously a  
10 connection between those two results.

11           And as far as their defense of  
12 justification, the evidence doesn't seem to show that.  
13 I take their justification argument to mean that they  
14 were justified in taking the money because of the  
15 legal expenses. But the bills that we have seen so  
16 far do not support that HERA was receiving the benefit  
17 of those legal expenses.

18           And just briefly on the promissory  
19 estoppel claim -- I'm not going to spend much time on  
20 that; you'll hear a lot about that in a minute. But I  
21 do want to refer to those quotations from the Texas  
22 trial as additional reasons that support our  
23 probability of success on the merits of that claim.  
24 They demonstrate that throughout the trial, the

1 strategy appears to have been to convince the jury  
2 that Highland was the good guy because they were --  
3 don't worry, they're going to hold on to the assets  
4 for Pat. Pat is going to get those assets if he  
5 proves his entitlement to them. But -- you know, so  
6 don't think we're bad for taking them. Tell us that  
7 we win now and we don't have to give them to him.

8                   The narrowest way to grant the motion,  
9 I think, is based on probability of success of the  
10 fraudulent transfer claim for actual intent to hinder,  
11 delay, or defraud. And Your Honor only needs to find  
12 that to issue the status quo order.

13                   On the balance of equities, also seems  
14 very clear to us. On the one hand, our client would  
15 go through potentially another half a decade or decade  
16 of litigation if he has to chase these assets again.  
17 And it would be a real shame to have to do that twice.  
18 On the other hand, the defendants, the harm that they  
19 identify on their side is that it would lower the bar  
20 for future plaintiffs against Highland that are  
21 seeking monetary damages to obtain a status quo order.  
22 And on that point, I just have to point out, again,  
23 that it is not only monetary damages that we are  
24 seeking, but seeking to move the escrow assets.

1                   The other harm that they identify is  
2 the harm to their reputation if they're required to  
3 freeze these assets for what I take them to perceive  
4 as a very small claim. But again, we're not only  
5 seeking monetary assets, so this is not just, as they  
6 characterize it, a \$3 million claim but a claim on  
7 specific assets. And their history of paying small  
8 claims is not great. So we think the balance of  
9 equity also favors Daugherty.

10                   Unless Your Honor has any other  
11 questions, that's all I have.

12                   THE COURT: I don't. Not at this  
13 time. Thank you.

14                   MR. REED: Good afternoon, Your Honor.  
15 John Reed from DLA Piper for the defendants.

16                   First of all, I want to apologize for  
17 what happened at the last hearing. We were only into  
18 the case for like two days. I had no idea that the  
19 lawyer that was going to present was not going to be  
20 able to answer Your Honor's questions. I was not  
21 happy about that, probably much more unhappy than the  
22 Court was and the Court was very unhappy.

23                   Mr. Katz is the lawyer most familiar  
24 with everything in this case. And he's here today to

1 present the arguments and should be able to answer all  
2 of Your Honor's questions.

3 THE COURT: I appreciate your comment.  
4 Thank you.

5 MR. KATZ: Your Honor, may I approach?

6 THE COURT: Yes.

7 MR. KATZ: Thank you for letting me be  
8 heard today.

9 And as Mr. Reed said, I echo his  
10 apologies for the last hearing. I apologize that I  
11 was not able to be here at that last hearing. But if  
12 Your Honor does have questions about -- I understand  
13 Your Honor's ruling, but if Your Honor does have  
14 questions about any of those matters, I'm happy to  
15 address those as well.

16 THE COURT: Thank you.

17 MR. KATZ: With respect to the status  
18 quo motion. Obviously, the Court is aware of the  
19 legal standard. I'm not going to go into that. I  
20 just want to address a few of the points that counsel  
21 addressed.

22 And I'd like to start with the  
23 irreparable harm element, which is one of the required  
24 elements. And counsel said a number of times that

1 they're seeking the assets, not just monetary relief.  
2 And I presume that that argument is being proffered  
3 because they recognize, otherwise, the issue with  
4 irreparable harm component that they have to show.

5 And I note, just by way of background,  
6 is that the Texas award was not in favor of  
7 Mr. Daugherty vis-a-vis HERA. It was not for specific  
8 assets; it was a monetary award. And, moreover,  
9 Mr. Daugherty never had ownership of -- direct  
10 ownership of any assets in HERA. Mr. Daugherty was a  
11 shareholder in an LLC and the LLC owned some assets.

12 So if their lawsuit is now seeking  
13 recovery of specific assets as opposed to monetary  
14 relief, I note that there's a host of procedural and  
15 substantive issues with that which I think goes well  
16 to the likelihood of success on the merits.

17 But the point for us today, Your  
18 Honor, is that a monetary award would certainly be  
19 sufficient to recompense Mr. Daugherty if he were to  
20 prevail on any of his claims in this case. And  
21 there's no evidence -- and maybe more importantly,  
22 there's no evidence that's been offered to the Court  
23 in support of the status quo motion that would  
24 demonstrate otherwise. And when I say "demonstrate

1 otherwise," demonstrate that there are assets that  
2 were in HERA that can't be valued, or some other basis  
3 to show some sort of irreparable harm. That issue is  
4 not even addressed.

5                   We're -- this is, I think, very  
6 apparently a case that -- where there is no  
7 irreparable harm. And money can certainly compensate  
8 for any harm that Mr. Daugherty may be able to prove  
9 ultimately that he suffered. The only evidence on  
10 that issue, I think as Your Honor correctly pointed  
11 out, was the affidavit of Scott Ellington. And that  
12 affidavit says to the contrary. It says, "... the  
13 value of Highland's assets exceed[s] the amount of the  
14 ... Award."

15                   There's absolutely no evidence in  
16 connection with the status quo motion that would show  
17 that there is irreparable harm or there is insolvency.  
18 In fact, what a good counsel wants to do is make  
19 allegations of what they believe is inappropriate  
20 conduct some by Highland, some by Highland's  
21 affiliates. And I note that the conduct that they've  
22 cited to in their motion are allegations taken from  
23 pleadings in other cases, as opposed to direct  
24 evidence of anything that has been done by Highland.

1 And most of it, again, is not directly Highland  
2 allegations to any extent.

3           There is -- and then also as Your  
4 Honor appropriately, I believe, questioned counsel  
5 about, there's no evidence of anything imminent on the  
6 horizon that might give rise to any potential concern  
7 that would support the status quo order. And what  
8 they're seeking is really, truly an extraordinary  
9 remedy. And I don't believe that they've pointed to  
10 any concrete basis which they can meet the high  
11 standard that they need to show to justify a status  
12 quo order.

13           THE COURT: How do you justify the  
14 situation here from the one in *Trussway*?

15           MR. KATZ: Well, I guess, Your Honor,  
16 in two ways. One, in *Trussway*, there's allegations of  
17 specific conduct. Where here, we've got -- there's no  
18 allegations of any conduct that they believe is about  
19 to occur or evidence to support that.

20           THE COURT: I suspect they would say  
21 that's because you haven't answered their questions,  
22 but I don't know.

23           MR. KATZ: Well, but, Your Honor, I  
24 guess that it would also go back to the irreparable

1 harm issue that, you know, there's nothing that --  
2 even the allegations, that if they were able to  
3 provide some supportive allegations in this case as  
4 opposed to relying on allegations in other cases,  
5 there would still be -- they still have not shown that  
6 there's any risk of insolvency or potential  
7 irreparable harm.

8                   And the *Mitsubishi* case that they  
9 cited in their brief I think is very on point. And on  
10 this issue where they had -- the Court noted that  
11 there was an allegation -- actually more than an  
12 allegation -- there actually was a prior incident that  
13 the Court had very serious concerns about but that on  
14 its own wasn't enough. It was -- the Court  
15 specifically found that the defendant in that case was  
16 insolvent. And they also found that there was a sale  
17 being negotiated, actual evidence of a sale, where the  
18 assets were going to be transferred. But we don't  
19 have that type of evidence with us in this case, Your  
20 Honor.

21                   On the likelihood of success on the  
22 merits, Counsel spent a little bit of time on that  
23 issue. But I think it's important, Your Honor, again,  
24 that this is an extraordinary remedy they're seeking

1 that has a heightened standard. And their motion on  
2 the likelihood of success on the merits simply has  
3 conclusory allegations, that they believe they're  
4 going to be able to prevail on the merits without  
5 addressing the specific elements and what evidence  
6 they've got to show the specific elements.

7 I note, you know, Counsel, in a number  
8 of pleadings has -- and I know Your Honor has noted  
9 this as well -- that Judge Glasscock had expressed his  
10 skepticism about when he was trying to determine what  
11 the nature of the escrow agreement was. And I note  
12 that Judge Glasscock, when he was doing that, also  
13 when he was talking about the formation of the escrow  
14 agreement, he was not talking about the resignation of  
15 Abrams & Bayliss or the -- what happened to the assets  
16 that formerly were held by HERA.

17 And, in fact, even Judge Glasscock  
18 indicated at that time that it may be that this  
19 fraudulent transfer claim was appropriate for summary  
20 judgment. I think his direct quote -- I know I wrote  
21 it down. His direct quote was that it wasn't  
22 prepared -- on page 79 and 80 of the transcript, that,  
23 "It may be ... perfectly fit ... for a motion for  
24 summary judgment. I'm just not convinced I can get

1 rid of it on a motion to dismiss ...." That was his  
2 quote.

3 But I think that has been turned on  
4 its head a little bit to say that because he didn't  
5 understand the purpose of the escrow agreement and why  
6 that was formed, that somehow that shows that the  
7 fraudulent transfer claim is a sure-fire winner. In  
8 fact, I also note that Judge Glasscock dismissed the  
9 same fraudulent transfer claim against Mr. Dondero in  
10 the motion to dismiss.

11 So we think there's a number of  
12 problems with each of the claims. And I know we're  
13 going to get to the promissory estoppel claim. But I  
14 think a couple of issues with that is that we've  
15 got -- that claim is predicated on two statements that  
16 were by individuals that I don't believe were clear  
17 and unequivocal type of statements that could support  
18 a promissory estoppel claim. But moreover, they went  
19 to the representation of what was in the terms of the  
20 escrow agreement.

21 And I believe the law is fairly clear  
22 that if there is a contract provision that addresses  
23 the issue at hand, then you cannot have a promissory  
24 estoppel claim based on a representation about that

1 contract claim. And Mr. Daugherty is absolutely  
2 seeking relief pursuant to the provisions in the  
3 escrow agreement. And that, in and of itself, would  
4 knock out his promissory estoppel claim.

5 And then -- and maybe the biggest  
6 problem -- I think he's got a number of problems with  
7 the promissory estoppel claim, but maybe the biggest  
8 one is reasonable reliance. Again, Mr. Daugherty  
9 hasn't even alleged that any of the statements were  
10 made for the purpose of causing Mr. Daugherty to  
11 reasonably -- to rely, and that it would be reasonable  
12 to expect him to do so.

13 But Mr. Daugherty's conduct -- he  
14 alleges that he would not have paid the judgment and  
15 that he would have sought to invalidate the escrow  
16 agreement at trial. And I think both of those are --  
17 they're also, again, conclusory allegations that he's  
18 made without sufficient -- he has not made allegations  
19 in his complaint in this action sufficient to  
20 withstand, I believe, a motion to dismiss, and  
21 certainly not to show a likelihood of success on the  
22 merits for the status quo motion.

23 But what he's really said and what he  
24 explained in the briefing that he meant by that is

1 that he would have sought offset. The problem that  
2 Mr. Daugherty has there is he -- offset is an  
3 affirmative defense.

4 THE COURT: I mean, we're all about to  
5 get into that very deeply, so ...

6 MR. KATZ: Okay, Your Honor. Thank  
7 you, I appreciate that.

8 But the likelihood of success on the  
9 merits on the promissory estoppel claim, I think, is  
10 very low. He's got similar issues on the unjust  
11 enrichment claim because of the representations and  
12 because of the equivalent value that HERA received in  
13 exchange for the assets.

14 On the fraudulent transfer claim, we  
15 don't believe that there was a transfer and there's  
16 been evidence of a transfer. And Counsel may respond  
17 to that and say, "Well, that's because Highland hasn't  
18 shown where the assets are." I'm anticipating that to  
19 be their response on that.

20 But I think Your Honor identified the  
21 point that that's not why you get a status quo motion.  
22 If they think there's evidence that they need, you  
23 know, there's a motion to compel. But for purposes of  
24 their motion, they have not produced any -- have not

1 cited to any evidence, have not even made the  
2 allegation that -- other than a conclusory  
3 allegation -- that they have a likelihood to succeed  
4 on the merits.

5 And then finally, Your Honor, I think  
6 they have the same -- the last element, that with the  
7 harm to him, the harm to Mr. Daugherty would outweigh  
8 the harm to Highland. They simply have a conclusory  
9 allegation in their motion without providing any  
10 support for that, Your Honor.

11 And again, I just -- I'm happy to talk  
12 about that issue further, but I think on a motion of  
13 this seriousness with the heightened standard, that  
14 they need to show that conclusory allegations are not  
15 sufficient.

16 THE COURT: Thank you.

17 MR. KATZ: Thank you, Your Honor.

18 MR. CHRISTENSEN: Just briefly, Your  
19 Honor.

20 I suppose it's an interesting  
21 philosophy of language, a question of what counts as  
22 something being conclusory. But we have certainly  
23 done more than offer a conclusion. We have laid out a  
24 timeline of actual intent to delay or defraud with

1 respect to the fraudulent transfer claim.

2 And just the items that are attached  
3 to our motion at Exhibit N, O, P, and Q, are a series  
4 of e-mails and events that I think anybody bringing a  
5 fraudulent transfer claim might characterize any one  
6 of them as a smoking gun. That is more than a  
7 conclusion. Our conclusion that this transfer was  
8 done with actual intent to defraud is based on very  
9 particular, very detailed, minute-by-minute documents.  
10 So it is certainly not conclusory. It's sort of  
11 conclusory to call that conclusory.

12 And it's important, also, to remember  
13 that when Vice Chancellor Glasscock suggested that  
14 potentially the fraudulent transfer claim could be fit  
15 for summary judgment disposition, he also said things  
16 like "Maybe there's a perfectly reasonable explanation  
17 for this." I think discovery has shown that there is  
18 not a perfectly reasonable explanation for this. And  
19 he did not have access to those documents, nor did we  
20 at the time that he made that statement.

21 As far as seeking this relief rather  
22 than simply monetary damages, that has been in our  
23 complaint since the beginning.

24 THE COURT: What is the -- can you

1 address the point that the Texas award is monetary and  
2 not for the specific assets that are mentioned now in  
3 your briefing?

4 MR. CHRISTENSEN: Sure. I can.

5 I'll address that by saying, quoting  
6 again HERA's closing argument in the Texas trial.

7 "... [I]f Pat Daugherty happens to prevail in his  
8 lawsuit against Lane, Patrick and HERA you heard Jim  
9 Dondero testify, he gets his interest, which is  
10 currently escrowed in the third-party escrow account,  
11 all of it."

12 We have made a claim for promissory  
13 estoppel that statements like that with codefendants  
14 show clear evidence of a promissory estoppel claim.  
15 That kind of statement shows how the statement was  
16 meant to be perceived, it shows how people did  
17 perceive it.

18 And I want to go to the jury question  
19 because we actually have -- unlike many cases where  
20 the idea of an objective standard, what would a  
21 reasonable person do, is sort of an academic question.  
22 But in this case we have a jury, which is sort of the  
23 quintessential reasonable person, writing back to the  
24 judge, "If we assign a dollar value to 'Fair Market

1 Value of Daugherty's HERA units' in Question 18" --  
2 that's the question that awarded him \$2.6 million --  
3 "is this in exchange for his HERA units currently in  
4 escrow, or in addition to them?" The judge instructed  
5 back, "Do not discuss or consider the effect your  
6 answers will have."

7 And then the final judgment made clear  
8 that it was not in exchange for those assets in  
9 escrow, that it was in addition to them. And there  
10 was appellate litigation about that issue, and it was  
11 settled that it was not a replacement for those units.  
12 But my point really is: We have very clear evidence  
13 that the Texas judgment and the people making the  
14 Texas judgment believed that those assets were being  
15 held in escrow for Pat Daugherty, which is exactly  
16 what the defendants tried to tell the jury to believe  
17 in their closing arguments.

18 So the fact that the Texas judgment  
19 was purely monetary is, A, not entirely true; and, B,  
20 it's not -- does not defeat the promises that they  
21 made throughout that trial, nor the fact that they  
22 transferred the assets once the judgment came through.

23 Let's see. On the promissory estoppel  
24 claim, it's just not what they said at trial, that Pat

1 Daugherty had an interest in this LLC but, by the way,  
2 there's nothing in it. So if you award him anything,  
3 it's going to be completely valueless.

4 I want to respond just briefly to the  
5 point that these assets can be valued. And they can  
6 be. This court is very experienced in appraisals.  
7 But the easiest and most efficient way to deal with  
8 this, the value, is to give the assets themselves  
9 rather than require, effectively, a -- more than one  
10 appraisal inside of this case, because there are  
11 assets held by a private equity fund, and those assets  
12 include private companies. So we would have to have a  
13 sort of quasi-appraisal action contained inside of  
14 this, instead of doing what is much easier for the  
15 parties and the Court and just addressing those assets  
16 in an equitable manner and providing an equitable  
17 remedy.

18 The affidavit does say that they are  
19 solvent. I believe the affidavit was also given by  
20 the same person that the -- it was either the  
21 arbitration panel in *Credit Strategies Fund* or the  
22 Bankruptcy Court in *Acis* said that Isaac Levinson's  
23 statements were not credible and that his statements  
24 contradicted documentary evidence in a clear way.

1                   In addition, they don't say by how  
2 much they are solvent. It could be the case, based on  
3 the face of that affidavit, that they are solvent by a  
4 million dollars. We simply don't know. And again,  
5 the question of solvency as it relates to irreparable  
6 harm in most of these cases is in a sort of antiseptic  
7 environment where it really is just a matter of: Does  
8 this party have sufficient assets?

9                   And again, that's not the only  
10 question in this case. The question in this case is:  
11 If the Court does nothing, what is the risk that  
12 Highland will do exactly what it has done to these  
13 assets vis-a-vis this litigant before?

14                   That's all I have, Your Honor.

15                   THE COURT: Thank you.

16                   My intention is to hear the status quo  
17 order and the motion to dismiss and then take a break  
18 and see if I can get something together to share my  
19 thoughts. So let's move on to the motion to dismiss,  
20 unless folks want to take a short break.

21                   MR. KATZ: I'm prepared to proceed,  
22 unless Counsel wants a break.

23                   MR. UEBLER: I'm prepared to go  
24 forward.

1 THE COURT: All right. You may  
2 proceed.

3 MR. KATZ: Thank you, Your Honor.

4 So I won't belabor the procedural  
5 background, because I know Your Honor is familiar with  
6 it, other than to say that after Judge Glasscock had  
7 dismissed a large number of Mr. Daugherty's claims,  
8 there was -- a promissory estoppel claim was then  
9 added. And we filed the motion to dismiss as to that  
10 claim, and that's the motion that we're here for  
11 today.

12 To prevail on a promissory estoppel  
13 claim, Mr. Daugherty has to allege a conceivable set  
14 of circumstances that would allow a showing that there  
15 was a promise that was made, that it was reasonable,  
16 that the expectation of the promisor was to induce the  
17 action of forbearance on the part of the promisee,  
18 that the promisee reasonably relied on the promise and  
19 took action to his detriment, and such promise is  
20 binding because injustice can be avoided only by  
21 enforcement of the promise.

22 And I do want to -- I will be  
23 efficient, but I want to address each of these  
24 elements, Your Honor. And the -- I want to start with

1 the reasonable reliance. As I mentioned a moment ago  
2 in connection with the status quo order, that  
3 Mr. Daugherty is really claiming that he would have  
4 sought offset had Mr. Dondero -- actually, I  
5 apologize, I want to take a quick step back.

6 Although Counsel's pointed to a  
7 closing argument of HERA, that I believe he attributed  
8 to Highland's counsel, I just want to be clear for the  
9 record that the statement that Counsel just read from  
10 the closing argument was for HERA, not for Highland,  
11 and there was separate counsel.

12 THE COURT: Hasn't there separately  
13 been an assertion of a common interest?

14 MR. KATZ: There was, Your Honor. But  
15 I just believe Counsel -- I'm sure it was  
16 inadvertent -- said "Highland." And I just want to be  
17 clear for the record that that statement was on behalf  
18 of HERA at closing argument.

19 But, more importantly, in the  
20 complaint they only allege two statements: a statement  
21 by Jim Dondero at trial and a statement by Mr. Klos in  
22 a declaration made several months after the final  
23 judgment. And so when Mr. Daugherty claims that his  
24 reasonable reliance was not seeking offset at the

1 trial, the second statement can't be a basis of that;  
2 and the issue that Mr. Daugherty has, that there can't  
3 be a reasonably conceivable set of circumstances to  
4 show reasonable reliance for a couple of reasons.

5 One, the date that Mr. Daugherty filed  
6 his counterclaims with his claims, he had -- the LLC  
7 agreement with Highland's offset provision against the  
8 value of HERA was in that document. In fact, that was  
9 the basis of one of Mr. Daugherty's claims, that there  
10 was going to be -- there was the risk of this improper  
11 offset. He was challenging those provisions.

12 But yet he never pled offset as a  
13 defense. And it is a required affirmative defense  
14 under Texas law. And it is clear that when the final  
15 judgment was entered, that's *res judicata*, that issue  
16 was barred.

17 So Mr. Daugherty is saying that now  
18 had Jim Dondero not testified as he did on the stand,  
19 that he would have filed the declaratory judgment  
20 action to offset the judgment that Highland obtained  
21 against him from the judgment he obtained against HERA  
22 cannot serve as the basis for a promissory estoppel  
23 claim in this action because he would be barred as a  
24 matter of law.

1 THE COURT: Is that a little too  
2 technical? I mean, is the point a little more  
3 abstract than that, which is that had Dondero not  
4 testified as he did and assured everyone in the  
5 courtroom that the escrow was there for Daugherty's  
6 satisfaction down the road, that there are plenty of  
7 different options he could have taken? I mean, any  
8 sort of resistance or leverage or anything like that  
9 in regards to paying his own judgment, whether or not  
10 a technical offset was procedurally available to him,  
11 seems to be kind of reducing this a little bit too far  
12 down into the technicalities.

13 MR. KATZ: Well, I don't believe so,  
14 for two reasons. But the most important one being  
15 there's no reasonably conceivable set of circumstances  
16 where he could have taken action. And I'll address  
17 that momentarily.

18 But to the point, that was his  
19 response. That's what's in his pleading, both in his  
20 complaint and in response to the motion to dismiss.  
21 That's what he said he would have done. And that  
22 wasn't available to him.

23 And it wasn't just filing a  
24 declaratory judgment action for offset that he would

1 have been barred from doing. He had two years to  
2 plead offset as a defense or to plead facts in the  
3 Texas action that arguably could have given rise to  
4 some reliance claim.

5 THE COURT: It seems odd to claim that  
6 there was no reliance because he didn't do something  
7 before the act in question happened.

8 MR. KATZ: Well, Your Honor, in fact,  
9 quite the opposite. As Mr. Daugherty said in his  
10 reply brief to the status quo motion -- and this is on  
11 page 2 and 3 of Daugherty's reply brief -- "In fact,  
12 during the trial and before Daugherty won his  
13 judgment, Defendants stressed that Daugherty was an  
14 owner of HERA units." Then he puts in a footnote, "At  
15 the same time, Defendants took the position that  
16 Daugherty held no economic interest in HERA.  
17 Accordingly, Daugherty did not take the purported  
18 admissions at face value and litigated for a judgment  
19 that he retained his HERA units."

20 And the significance of that, Your  
21 Honor -- it's the same significance as what I was  
22 trying to say a moment ago and I probably did not say  
23 it very clearly -- is from the moment he filed this  
24 claim, he was aware that, as he says here, that his

1 value -- the value of his shares in HERA were  
2 valueless, as Highland was saying they were. Because  
3 that was one of his claims in the lawsuit. And he did  
4 not do anything to try to protect that vis-a-vis a  
5 judgment that Highland might get against him at any  
6 time during the trial.

7                   So to think that, "Oh, well, he was  
8 about to do it" after two years, knowing everything  
9 that he knew, the LLC agreement allowing the offset,  
10 Highland taking the position that his units were  
11 valueless even though he was suing for it, that  
12 somehow he was going to try to offset his claim  
13 against HERA against Highland's claim against him, and  
14 he just didn't do it because Jim made the statement he  
15 did on the stand is not a reasonably credible  
16 position. It's not something that could have a -- or  
17 there could be a reasonably conceivable set of  
18 circumstances to show a reasonable and detrimental  
19 reliance.

20                   And I think -- and, Your Honor, if you  
21 also look at the whole circumstances around  
22 Mr. Dondero's statement on the stand, was not -- in  
23 fact, the question -- it was by HERA's counsel that  
24 was questioning him at the time. And the question

1 was: The assets that are being escrowed, or the money  
2 that's being escrowed right now, what happens to them?  
3 And I think it's significant for a couple of reasons.

4 One, right now they're talking about  
5 the day that the question was asked. They're not  
6 talking about a day in the future. And I think it's  
7 also significant that that was --

8 THE COURT: Maybe that was the  
9 question, but the answer was, "In the future they will  
10 go to him."

11 MR. KATZ: That's -- Your Honor,  
12 respectfully, that's not the way I read it. But I  
13 think the point is -- two points, Your Honor. One,  
14 that was a question by HERA's counsel; that was not a  
15 question by Daugherty's counsel.

16 If this was so important that  
17 Daugherty was going to forego seeking to invalidate  
18 the escrow agreement or trying to do trial amendment  
19 and get a new claim in, there was no action by his  
20 counsel to follow up and say: Let's be clear. Let's  
21 not talk about right now, let's talk about in the  
22 future. And again -- or ask about what about the  
23 resignation provisions, what about the termination  
24 provisions.

1                   There's a whole host of conditional  
2 circumstances that show that Mr. Daugherty,  
3 purportedly relying on that statement to not try to  
4 bring a declaratory judgment action for offset or to  
5 seek to invalidate the escrow agreement would have  
6 been reasonable reliance. Again -- because, in fact,  
7 up until that point, Mr. Daugherty not only waited two  
8 years, he waited past the amended pleading deadlines.  
9 In the face of what he says, I'm being told by  
10 Highland that my assets are valueless. You know, and  
11 to the extent they say that I'm still owning HERA  
12 units, I never believed that there was anything there.  
13 But yet he didn't do anything about it before  
14 Mr. Dondero made the statement to HERA's counsel.

15                   So, again, all of those, all of that  
16 goes to whether he could have -- show any circumstance  
17 where he could have reasonably relied.

18                   Similarly, I think if you look -- and  
19 I bring in these things to show Your Honor what is not  
20 in the complaint or not in the response to the motion  
21 to dismiss. After the judgment, he claims that he was  
22 entitled to this offset, but yet he paid his full  
23 judgment. He could have just paid the difference in  
24 the judgment.

1 THE COURT: That's the point, is that  
2 he paid the whole judgment; right? Kind of chipperly  
3 wrote the check and thought it was all going to work  
4 out in the end.

5 MR. KATZ: Right. Well, without --  
6 but with the whole circumstances and you look at his  
7 allegations, if his allegations are to be believed,  
8 it's not reasonable to believe that somebody who was  
9 going to do what he did but for Jim Dondero's  
10 statement would have, again, waited for two years, not  
11 filed -- not done -- taken the legal actions that he's  
12 now claiming he would have taken.

13 He did seek to amend his pleadings  
14 right before trial. These were not in there. That  
15 was, again, before these statements. Again, it's not  
16 credible to believe that he reasonably relied. And he  
17 hasn't alleged anything.

18 Again -- and so that was why I said  
19 initially to Your Honor's question, there are two  
20 points. One, when you look at the totality of what he  
21 didn't allege and what he didn't do, that there can be  
22 no set of circumstances where he reasonably relied,  
23 but then when you look at what he says he would have  
24 done, which is the offset. And he would have been

1 legally barred from doing that because he waived it.  
2 Also because -- and the law is cited in our motion,  
3 that because Highland and HERA are separate entities,  
4 there wouldn't have been an offset between those  
5 judgments anyway.

6 So the two things he says that he  
7 would have done was seek to invalidate the escrow;  
8 which, again, he was aware of that escrow agreement  
9 before trial. He sought to amend his pleadings before  
10 trial but did not address that escrow agreement at  
11 all.

12 He has shown that he believes that  
13 his -- before Mr. Dondero made that statement, he  
14 didn't -- he thought his HERA units had been rendered  
15 valueless and that's how he was litigating the case.  
16 But he didn't try to "invalidate" the escrow  
17 agreement. He also doesn't explain or provide any  
18 allegation of what that means, to invalidate the  
19 escrow settlement.

20 He doesn't provide any legal theory or  
21 allegation of evidence to support a legal theory that  
22 would show that had he sought to invalidate the escrow  
23 agreement that the court would have allowed that  
24 amendment and it would have changed the outcome.

1                   The next element I want to talk about  
2 was that a promise was made. And, again, he's  
3 identified two promises: one by David Klos, one by Jim  
4 Dondero. There's -- the one by Mr. Klos, again, was  
5 done several months after trial. The one by  
6 Mr. Dondero is obviously during trial. But both of  
7 those statements, when you look at them, are not  
8 unequivocal statements of -- there was no set of  
9 circumstances where Mr. Daugherty will not be paid  
10 this money on a final, nonappealable judgment. And --  
11 which is what --

12                   THE COURT: Why is that not exactly  
13 what Mr. Dondero said?

14                   MR. KATZ: Well, Your Honor,  
15 Mr. Dondero was being asked a question about the  
16 language in the escrow agreement, that specific  
17 provision. And he was being asked based on  
18 circumstances right now. And perhaps if I give you an  
19 analogy. If I hire an employee and I'm paying the  
20 employee \$50,000 a year and they're an at-will  
21 employee, and somebody asks me, "Well, how much does  
22 that employee make?" I'm not likely going to say,  
23 "Well, annually \$50,000 a year, but I can terminate  
24 them at any time." Or "\$50,000 a year, but less

1 withholding," or other caveats.

2 And the question that was asked to  
3 Mr. Dondero is the -- right now the assets that are --  
4 and I apologize, I don't -- I can grab the quotation.  
5 I don't have it right in front of me. But the key  
6 part was that it was predicated on right now, what  
7 happens right now if there's a final judgment.

8 So -- and, again, this is Mr. Dondero  
9 who's an individual defendant who is not being  
10 questioned as a representative of Highland. And what  
11 they want to do is take that statement and say this is  
12 an unequivocal statement that was binding Highland.  
13 And it just doesn't rise to that level under the legal  
14 standard.

15 And, you know -- but, moreover --  
16 again, because what -- Mr. Dondero was reading the  
17 escrow agreement on the stand as a layman, but that's  
18 really more significantly the point, is that if the  
19 alleged promises are subject to termination by a  
20 contract -- I know this is in our pleading, the  
21 *TrueBlue HRS Holding* case -- promissory estoppel does  
22 not apply where a fully integrated and enforceable  
23 contract governs the promise at issue.

24 And that's the issue, is the contract

1 is the contract; it means what it means. And the --  
2 unless there -- I don't believe, Your Honor, that they  
3 even alleged that there is some promise, unequivocal  
4 promise, that Mr. Dondero or Mr. Klos made that was  
5 not subsumed by the escrow agreement. And that's  
6 really the basis of their claim here.

7                   They also have to show that the claim  
8 is necessary to avoid injustice. And obviously, they  
9 have brought a fraudulent transfer claim and an unjust  
10 enrichment claim arising out of the same course of  
11 conduct, that they claim these representations are  
12 related to those claims. And I think the case law is  
13 fairly clear on this, that this is exactly the type of  
14 situation where a promissory estoppel claim is not  
15 necessary to avoid injustice.

16                   THE COURT: But is the conclusion to  
17 be taken from your argument that nothing can ever be  
18 pled in the alternative to a promissory estoppel  
19 claim?

20                   MR. KATZ: No, not at all. But I  
21 believe that you would have to have a set of  
22 circumstances where there wasn't a fully integrated  
23 enforceable contract, and that the underlying promises  
24 weren't about the interpretation of that contract.

1                   And then, finally, Your Honor, I'm  
2 going to use the word "conclusory" again, that they --  
3 well, actually not even conclusory, Your Honor. They  
4 didn't even plead that Highland intended to induce  
5 reliance or that Highland should have reasonably  
6 expected to induce reliance by Mr. Daugherty.

7                   And I don't think that's necessarily  
8 an accident. I think that's because the statements  
9 that they're relying on were not statements that were  
10 made on behalf of Highland. They're individual  
11 statements. And I think that it would be fairly  
12 tortured to say otherwise.

13                   So, Your Honor, again, for each of  
14 those reasons, we don't think that they have pled any  
15 reasonably conceivable set of circumstances that could  
16 support the promissory estoppel claim.

17                   THE COURT: Thank you.

18                   MR. KATZ: Thank you, Your Honor.

19                   MR. UEHLER: Good afternoon again,  
20 Your Honor.

21                   THE COURT: Good afternoon.

22                   MR. UEHLER: I'll start with the  
23 promise that was made. And before I do, I think I  
24 heard Mr. Katz talking about the standard to prevail

1 on a claim. And I understand we're a little bit late  
2 in the game of this lawsuit. But this is a 12(b)(6)  
3 motion and the standard is reasonably conceivable.

4 So I just want to reset where we are  
5 on this motion and talk about the promise that was  
6 made, briefly. So what was the promise? The promise  
7 was Jim Dondero testifying at trial, under oath, that  
8 Mr. Daugherty's assets would be held in escrow and  
9 released to him through HERA if he won in Texas. I  
10 mean, it was as simple as that.

11 You may have been left with the  
12 impression from Mr. Katz's presentation that the line  
13 of questioning was about the terms of the escrow  
14 agreement. I can save all of us and just refer to the  
15 pages of the testimony, or I'd be glad to read the  
16 preceding three or four questions to set that up. But  
17 it was not interpreting the escrow agreement. And  
18 Mr. Katz didn't have the testimony on hand, but I do.  
19 And the question was:

20 "Question: Okay, so -- so if  
21 Mr. Daugherty somehow prevails in his lawsuit against  
22 Patrick Boyce and Lane Britian and HERA, what happens  
23 to Mr. Daugherty's interest that's being escrowed  
24 right now with a third-party escrow agent?

1 "Answer: They go to him.

2 "Question: I'm sorry?

3 "Answer: They go to him via to HERA  
4 and then to him."

5 Is that promise consistent with the  
6 escrow agreement? Yes. Is that promise separate and  
7 apart from the escrow agreement? Yes. Mr. Dondero  
8 wasn't there interpreting a contract. He was there  
9 making a promise to Daugherty and to the jury.

10 And just as we allege in paragraph 131  
11 of our complaint, it was the reasonable expectation of  
12 Highland, when that promise was made, that it was  
13 going to be relied on.

14 THE COURT: Tell me more how the  
15 statement was separate and apart from the contract.

16 MR. UEBLER: The statement is separate  
17 and apart from the contract because I think --  
18 Mr. Katz would be the first one to tell you that  
19 Mr. Daugherty was not a party to the escrow agreement.  
20 Mr. Daugherty, on the face of it, has no rights under  
21 that escrow agreement.

22 So this idea that Highland proposes  
23 that because there's a contract out there that also  
24 addresses the subject matter of the promise, the

1 promisee is, therefore, precluded from relying on that  
2 promise, it just -- it doesn't hold water. They  
3 don't -- they didn't cite any cases.

4 We said it's not the law of Delaware  
5 and never should be. Highland shouldn't be allowed to  
6 contract with Abrams & Bayliss and then use that  
7 contract to say that a promise made to Daugherty that  
8 Daugherty seeks to enforce, that is -- you know,  
9 follows the terms of that contract but doesn't  
10 expressly give any rights to Daugherty, that's just --  
11 that's not an argument that the Court should accept,  
12 in our view. So that's why I say it's separate from  
13 the contract.

14 And that also gets into the  
15 alternative claim argument, too. Are we entitled to  
16 bring promissory estoppel and a fraudulent transfer  
17 claim and an unjust enrichment claim? I think the  
18 *Chrysler* case in the Supreme Court settled that  
19 question a long time ago. And I think Rule 8 of this  
20 court does, too.

21 So, of course, there's overlap in what  
22 was promised and what's in the escrow. Although, I  
23 will point out, the escrow -- Mr. Katz said something  
24 like -- he referred to a host of conditional

1 circumstances in the escrow agreement. And I think  
2 his point was paragraph 5 and paragraph 10 that they  
3 had relied on when Abrams & Bayliss resigned. Well,  
4 you won't find any of that in the promise that was  
5 made by Jim Dondero under oath to Pat Daugherty and  
6 the jury. So whatever conditional circumstances may  
7 be in that contract, they're not in that promise.

8 And the notion that Jim Dondero was  
9 testifying in his individual capacity, I think we  
10 debunked that in Exhibit A to our answering brief --  
11 which was Highland's own witness list -- that provided  
12 an entire paragraph of what Mr. Dondero would be  
13 testifying about, including testimony in support of  
14 Highland's and Cornerstone's claims against Daugherty  
15 and the damages suffered and the third-party  
16 defendants' defenses to claims asserted against them.

17 So Jim Dondero is Highland. He is  
18 HERA. He's HERA ERA management. He controls them  
19 all. Mr. Katz pointed out that the closing argument  
20 by HERA's lawyer in Texas was just HERA's lawyer.  
21 Well, Jim Dondero controls HERA, just as he controls  
22 Highland. So I view that as a distinction without a  
23 difference.

24 But what that closing argument did was

1 reaffirm the promise -- I thought I had it here. So  
2 what was said on closing argument by HERA's counsel,  
3 just after Jim Dondero made the promise, was "... if  
4 Pat Daugherty happens to prevail in his lawsuit  
5 against Lane, Patrick and HERA you heard Jim Dondero  
6 testify he gets his interest, which is currently  
7 escrowed in the third-party escrow account, all of  
8 it."

9                   Then we had the other promise, which  
10 was that September -- September of 2014, the Klos  
11 affidavit. It restated the promise. This gets to the  
12 reasonableness of the reliance of Daugherty's  
13 promise -- the promise to Daugherty. He kept hearing  
14 this.

15                   And the idea that Daugherty should  
16 have somehow foreseen in either the six weeks between  
17 when Highland sprung the escrow agreement on him  
18 before trial or when Dondero testified or when Klos  
19 submitted his affidavit -- by the way, as the senior  
20 finance of Highland Capital -- that Daugherty should  
21 have foreseen two years from now when he went to pay  
22 the judgment that Highland was going to break that  
23 promise.

24                   So the idea that Daugherty should have

1 done something between December 2013 and December of  
2 2016, I think entirely misses the point of our claim.  
3 The reliance that we allege -- and it's paragraph 133  
4 of our complaint -- is "In further reliance on the  
5 promises of Highland Capital and its agents, on  
6 December 14, 2016, nine days after Highland Capital  
7 secretly obtained the Escrow funds, Daugherty wired  
8 approximately \$3.2 million in cash to Highland Capital  
9 in satisfaction of its award of attorneys' fees in the  
10 Texas Action."

11 That was the reliance. What could  
12 have been done, other than a cash payment, Daugherty  
13 could have just engaged in self-help. He could have  
14 paid the difference between the 2.6 and the 2.8 of the  
15 judgments. He could have not paid anything at all.  
16 He at least should have had the chance to go to court  
17 like the petitioner did in the *Bonham Bank* case that  
18 we cite from Texas to explain to a judge why, under  
19 these circumstances, even though there are three  
20 different litigants involved, these claims should be  
21 offset. But he didn't even get that chance because he  
22 relied on Highland's promises and he wired the full  
23 amount. They took away that chance from him.

24 We don't have to prove today whether

1 he would have won on that setoff claim in Texas or  
2 anywhere else. We just have to prove that it's  
3 reasonably conceivable that he was deprived of that  
4 chance because he reasonably relied, to his detriment,  
5 on a promise that was made under oath and repeated.

6 In their opening brief, the defendants  
7 stated that "Injustice can (and should) be avoided  
8 through collection efforts in the Texas Action, which  
9 Daugherty has not even attempted to pursue, making  
10 this claim premature."

11 I just wanted to point out, this was  
12 in Exhibit B to Highland's own opening brief. They  
13 attached Mr. Daugherty's interrogatory responses. And  
14 if you look at Interrogatory 36 on page 25,  
15 Mr. Daugherty stated that "... apart from filing this  
16 action to collect his Texas judgment, he filed for a  
17 writ of execution in Texas on July 7, 2017, which was  
18 unsuccessful because Highland Capital claimed HERA had  
19 no assets. The return of service was dated  
20 September 26, 2017."

21 I think that's totally irrelevant to  
22 the questions before the Court, but I wanted to point  
23 out that Mr. Daugherty did, in fact, attempt some  
24 collection efforts in Texas and those were

1 unsuccessful.

2 I'd also like to point out that in  
3 addition to being able to plead alternative claims,  
4 this is one of those cases where injustice can only be  
5 avoided through the enforcement of this promise,  
6 notwithstanding the other claims out there. The  
7 injustice to be avoided is allowing Highland Capital  
8 to walk away with both judgments from the Texas  
9 action. They got Daugherty's 3.2 million, and they  
10 got his HERA assets. And that's the injustice to be  
11 avoided.

12 When you and Mr. Katz were discussing  
13 this element, he referred to a fully integrated  
14 contract. Again, he would be the first to tell you,  
15 I'm sure, that Daugherty has no rights under that  
16 fully integrated contract. So the fact that there is  
17 a similar contract out there is not relevant to the  
18 analysis.

19 That's all I have, Your Honor.

20 THE COURT: Thank you.

21 MR. UEHLER: Thank you.

22 MR. KATZ: Your Honor, can I just  
23 address a couple points?

24 THE COURT: Yes.

1 MR. KATZ: For clarity purposes,  
2 Counsel -- this is the second time they've read the  
3 statement from HERA's counsel during the closing  
4 argument. That was not part of the statements that  
5 were alleged to be part of the detrimental reliance in  
6 either the complaint or in the response to the motion  
7 to dismiss.

8 And I think that's significant, again,  
9 because Counsel is certainly correct that what they  
10 say is that Daugherty would not have paid the judgment  
11 against him by Highland. But their explanation of  
12 what that means is that he would have sought offset or  
13 sought to invalidate the escrow agreement, both of  
14 which could only have been done, been sought, during  
15 trial. I suspect that's why they are not relying on  
16 the statement that was made at closing argument where  
17 it would have been too late for them to make those  
18 allegations.

19 Highland had a judgment, a fully  
20 perfected final judgment, collectible judgment that  
21 Mr. Daugherty paid. And from the motion to dismiss  
22 perspective, claiming that he would have filed either  
23 or both of two things that were barred by *res judicata*  
24 does not provide the basis to avoid -- where there's a

1 reasonably conceivable set of circumstances that those  
2 allegations could support to avoid a motion to  
3 dismiss.

4                   And, again, we're really just talking  
5 about Jim Dondero's statement because, as Counsel  
6 recognized, the Klos statement was made, I believe,  
7 roughly five months after the -- four or five months  
8 after the final judgment was entered.

9                   And then, finally, lastly, I just want  
10 to touch on the escrow agreement. Of course we  
11 recognize Mr. Daugherty is not a party to that  
12 agreement. But Mr. Daugherty's case is that he is  
13 asserting rights under that escrow agreement. He is  
14 certainly saying that there was a transfer under that  
15 agreement and that that agreement required the assets,  
16 the money being held pursuant to that escrow  
17 agreement, to go to HERA, which then Mr. Daugherty as  
18 the shareholder of HERA would have had rights to.

19                   And, you know, we disagree with some  
20 of the underlying factual basis. We don't agree that  
21 there was a transfer. But I think counsel for  
22 Mr. Daugherty would certainly not say that there's not  
23 a fully enforceable promise in that escrow agreement  
24 that they are seeking relief under.

1                   And that's -- and just as importantly,  
2 Mr. Dondero's statement was exclusively an  
3 interpretation of that promise. And that's why -- and  
4 I think that's exactly what the *TrueBlue* case is  
5 referring to. And there's a fully integrated contract  
6 that has the promise that legally and factually  
7 determines what the rights under that contract are.

8                   And Mr. Dondero's interpretation of  
9 that contract -- even if it's the exact same as the  
10 contract or even if it's different than the  
11 contract -- doesn't change that the claim is pursuant  
12 to the contract and not for promissory estoppel.

13                  THE COURT: What is your understanding  
14 of Mr. Daugherty's ability to sue to enforce the  
15 escrow agreement in a way that benefits him?

16                  MR. KATZ: Well, he is a shareholder  
17 of HERA. And as a shareholder of HERA -- I mean, I'd  
18 have to think through all the *res judicata*, collateral  
19 estoppel, statute of limitations issues that all have  
20 come out about all the issues that have been  
21 litigated.

22                  THE COURT: I just mean from the terms  
23 of the contract.

24                  MR. KATZ: I don't believe that

1 Mr. Daugherty is a third-party beneficiary of the  
2 contract, if that's Your Honor's question. He's  
3 certainly not a direct party to the contract, but he  
4 is a shareholder of HERA. And their allegations are  
5 that Highland was contractually obligated to send  
6 money to HERA under that agreement.

7 I think there are potentially  
8 technical legal issues under that. That's, of course,  
9 not the claim that Mr. Daugherty has brought. And --  
10 but if Mr. Daugherty had any rights, it would be  
11 through HERA.

12 THE COURT: So is it your  
13 understanding that the point of the doctrine that  
14 you're relying on, that there can't be both a contract  
15 and a claim for promissory estoppel, is that those  
16 rights substantially overlap?

17 MR. KATZ: I would suspect that's  
18 probably the policy reason behind those decisions.

19 THE COURT: So if Mr. Daugherty  
20 doesn't have contractual rights under the escrow  
21 agreement, why does that knock out his promissory  
22 estoppel claim?

23 MR. KATZ: Because it's the same --  
24 because whatever rights he has under the contract,

1 whether he has rights or not, are no different than  
2 any rights he would have vis-a-vis Mr. Dondero's  
3 interpretation of what that contract said, what that  
4 contractual language says.

5 THE COURT: Go ahead.

6 MR. KATZ: I think that the policy is  
7 is not to create quasi-contractual claims when there  
8 is a contract, regardless of who's the party to the  
9 contract.

10 And, actually, I think it's even --  
11 there's no wiggle room around this situation because  
12 it's not -- Mr. Dondero was -- I mean, I think the  
13 quote was, "They go to Mr. Daugherty through HERA" is  
14 the quote. He wasn't saying something -- there's not  
15 been an allegation, for example, that Mr. Dondero's  
16 statement or Mr. Klos' statement created a separate  
17 contract between Mr. Dondero or Mr. Daugherty.

18 I mean -- and that's not what -- I  
19 mean, there hasn't been an allegation that that's what  
20 they were saying -- that Mr. Dondero was saying that  
21 or Mr. Klos was saying that. The allegation is they  
22 were saying that's what the contract, the escrow  
23 agreement, means. And that's why you can't have a  
24 separate claim, because the contract means what it is

1 and the contract determines the rights.

2 THE COURT: I understand.

3 MR. KATZ: Thank you, Your Honor.

4 THE COURT: Thank you.

5 MR. UEHLER: May I, briefly?

6 THE COURT: Briefly.

7 MR. UEHLER: Just to be clear, Your  
8 Honor, we very much rely on the Klos statement as a  
9 separate promise on behalf of Highland in the  
10 affidavit. We think it also supports the  
11 reasonableness of the reliance on Mr. Dondero's  
12 promise on behalf of Highland. But we view the Klos  
13 affidavit as part of the promise generally.

14 With respect to the closing argument  
15 by HERA, we didn't use it sooner because we just --  
16 actually, I have to give credit where credit is due --  
17 my colleague, Mr. Christensen just found it. We  
18 didn't try the Texas case, so we did find it in the  
19 record.

20 And fortunately for us, Highland  
21 agrees on pages 13 and 14 of their own motion to  
22 dismiss that the Court can "[consider] additional  
23 materials from related litigation that were not  
24 attached to the complaint if the plaintiff relied on

1 those materials in casting his complaint, as Daugherty  
2 has done with regard to the Texas Action."

3           The last paragraph on page 14 goes on  
4 to say, "To the extent the Court finds that the Texas  
5 Action materials are not already subject to  
6 consideration based on Daugherty's extensive reliance  
7 on them, Defendants respectfully request that the  
8 Court take judicial notice of the documents under  
9 Delaware Rule of Evidence 202(d)(2)."

10           So we submit that the Court certainly  
11 can consider the trial transcript from the Texas  
12 action as further support for the reasonableness of  
13 Mr. Daugherty's reliance.

14           And my final point with respect to the  
15 escrow agreement and the notion -- I think that what  
16 Mr. Katz said is that Daugherty, in his view, has no  
17 direct rights under that agreement. The only real  
18 direct relevance of the escrow agreement with respect  
19 to the promissory estoppel claim is that it's even  
20 more evidence of the reasonableness of Mr. Daugherty's  
21 reliance on the promise because it's consistent with  
22 that promise.

23           Thank you, Your Honor.

24           THE COURT: Thank you.

1 Anything to -- Mr. Katz, I'll give you  
2 the last word.

3 MR. KATZ: No, Your Honor.

4 Just to address Counsel's last point  
5 about just finding the statement. You know, again, I  
6 think that the issue is what did Mr. Daugherty  
7 actually rely on. Their claim is that when he wired  
8 \$3.2 million -- not what statements Counsel has found  
9 in the record recently that could be retroactively  
10 applied that way.

11 And Counsel's -- again, the complaint  
12 that is in front of Your Honor that has the  
13 allegations rely on the two statements and is very  
14 clear that -- it is explained in their briefing --  
15 that the remedies -- that the detrimental reliance was  
16 forbearance from taking action in the Texas lawsuit.

17 So anything that occurred anytime  
18 after they could raise issues in a Texas lawsuit could  
19 not have been a basis for detrimental reliance.

20 THE COURT: Thank you.

21 I'm going to take a recess. It will  
22 be at least 20 minutes. So stretch your legs, do  
23 whatever. It'll probably be longer than that. But --  
24 thanks for your patience, but it's faster this way in

1 the short term.

2 So we are in recess.

3 (Recess taken from 3:35 p.m. until 4:18 p.m.)

4 THE COURT: Thank you for your  
5 patience.

6 I'm going to start with the motion for  
7 a status quo order. It is denied. We have some time  
8 constraints this afternoon, so I will cut to the  
9 chase. Daugherty has not established a threat of  
10 imminent irreparable harm as he must. It is clear  
11 that Daugherty is pursuing this relief now based on  
12 what happened in the *Redeemer* case. This complaint  
13 was filed in July 2017, and he did not seek the relief  
14 that he's now seeking until after the papers on the  
15 status quo order dispute were filed in the *Redeemer*  
16 case. And Daugherty cites Highland's submissions in  
17 that case in his brief.

18 I disagree with Daugherty's reading of  
19 the *Redeemer* papers as indicating that Highland is in  
20 "severe financial distress" and is "unable to satisfy"  
21 the arbitration judgment at issue there. And the  
22 facts are very different as between the two cases.  
23 Before going to arbitration, there were issues  
24 involving control over assets that led to Highland

1 making representations to the Court in the *Redeemer*  
2 case. And in the more recent request for a status quo  
3 order related to confirming an arbitration judgment,  
4 there was no separate claim that this court needed to  
5 adjudicate, like Daugherty's fraudulent transfer claim  
6 here.

7 And, finally, the *Redeemer* parties  
8 ultimately stipulated to a status quo order. So I  
9 don't think that anything that this court did in  
10 entering the agreed-upon status quo order is helpful  
11 in deciding whether to issue one in this case.

12 Daugherty says that Highland has a  
13 pattern of avoiding judgments, but has given me no  
14 reason to think that Highland is going to do something  
15 between now and a post-trial opinion that would make  
16 it incapable of satisfying a judgment, nor is there  
17 anything in the *Redeemer* case that leads me to believe  
18 that.

19 Quite frankly, if Highland is as good  
20 at avoiding judgments as Daugherty claims, Highland  
21 would have already moved the assets. Daugherty, in  
22 his reply, touches on that point and raises concerns  
23 about whether the assets have already been  
24 transferred. He used a metaphor about the straw

1 breaking the camel's back. I'm going to use a  
2 different ungulate. He's provided no reason to  
3 believe the horse is not already out of the barn or  
4 that the horse is going to imminently flee the barn.

5 So I fully appreciate that Daugherty  
6 says that this is what happened to him in Texas, and  
7 I've indicated before that I agree with Vice  
8 Chancellor Glasscock's sentiment that what happened  
9 here fails more than the smell test. But that doesn't  
10 mean that there is a sufficient imminent threat that  
11 it's going to happen here with Highland.

12 I also distinguish this case from Vice  
13 Chancellor Glasscock's entry of a status quo order in  
14 the *Trussway* matter, which admittedly was, in part,  
15 based on Highland's "prior history." In that ruling,  
16 Vice Chancellor Glasscock noted the unique appraisal  
17 remedy that was at issue there, and distinguished that  
18 property right -- which is meant to substitute for a  
19 stockholder's ability to insist on unanimity in a  
20 merger -- from recovery in a tort or contract case.  
21 Daugherty is seeking the more common sort of recovery  
22 here, so I do not find *Trussway* instructive.

23 So, in sum, because Daugherty's motion  
24 for a status quo order is based on a recent

1 development that does not support a conclusion that  
2 Daugherty faces imminent irreparable harm, the motion  
3 for a status quo order is denied.

4 Mr. Christensen, do you have any  
5 questions about that?

6 MR. CHRISTENSEN: No, I do not.

7 THE COURT: Okay. Anything from DLA?

8 MR. KATZ: No, Your Honor.

9 THE COURT: Thank you.

10 Moving on to the motion to dismiss.  
11 Highland's motion to dismiss Count IX of the amended  
12 complaint is denied. Count IX is a claim for a  
13 promissory estoppel. And to state a claim for  
14 promissory estoppel, a plaintiff must plead four  
15 elements.

16 The first is that a promise was made.  
17 The second is that it was the reasonable expectation  
18 of the promisor to induce action or forbearance on the  
19 part of the promisee. The third is the promisee  
20 reasonably relied on the promise and took action to  
21 his detriment. The fourth is that the promise is  
22 binding because injustice can be avoided only by  
23 enforcement of the promise. That's all from the  
24 *Chrysler* case out of the Supreme Court in 2003.

1                   On Highland's motion to dismiss, I  
2 applied a reasonable conceivability standard of  
3 Rule 12(b)(6). Under that standard, I must accept all  
4 well-pleaded factual allegations as true, accept even  
5 vague allegations in the complaint as well-pleaded if  
6 they provide the defendant notice, draw all reasonable  
7 inferences in favor of the plaintiff, and deny the  
8 motion unless the plaintiff could not recover under  
9 any reasonably conceivable set of circumstances  
10 susceptible of proof. That familiar standard is from  
11 *Century Mortgage Company v. Morgan Stanley*.

12                   Applying this standard, plaintiff has  
13 adequately pled the four elements. First, Highland  
14 made promises through representations it and its  
15 agents made in the Texas action. Highland, through  
16 testimony, explained that Daugherty would receive the  
17 escrowed assets upon a judgment being finalized.

18                   Daugherty cites testimony from James  
19 Dondero, Highland's cofounder and president. On  
20 direct examination, Dondero was asked what would  
21 happen to Daugherty's interest that was being held in  
22 escrow, and Dondero stated that it would go to  
23 Daugherty via HERA if he won. This testimony is cited  
24 in paragraphs 43 and 129 of the complaint.

1 Highland tries to distance itself from  
2 Dondero, but it cannot do so at this stage. Highland  
3 says Dondero was testifying in a personal capacity.  
4 But the witness list Highland filed in the Texas  
5 action shows that is not the case. That is Exhibit A  
6 to Daugherty's answering brief. Highland had no  
7 response to this in its reply brief, beyond  
8 reiterating its original argument that Dondero was not  
9 speaking on Highland's behalf.

10 Based on the allegations of the  
11 complaint, including Dondero's role, it is reasonably  
12 conceivable he was speaking on behalf of Highland.

13 Other support for the alleged promise  
14 comes from an affidavit attached as Exhibit I to the  
15 complaint from David Klos. Klos submitted the  
16 affidavit and stated he had "... personal knowledge of  
17 the facts stated in this affidavit as the Senior  
18 Manager of Finance for Highland Capital ..." and  
19 because he oversaw accounting relating to HERA. Klos  
20 reiterated in his affidavit what the escrow agreement  
21 says, and Dondero testified to, which is that after a  
22 final nonappealable judgment, A&B, as the escrow  
23 agent, would transfer the deposit assets to HERA.

24 Highland also tries to distance itself

1 from Klos. And it cannot do so, as the document  
2 presented to the Texas court states Klos was providing  
3 the affidavit in his capacity as Highland's Senior  
4 Manager of Finance. At this stage, that is  
5 sufficient.

6 Together, these allegations are  
7 sufficient to establish that Highland made a promise  
8 that the assets would be held in escrow and released  
9 to Daugherty, via HERA, if Daugherty won in Texas.

10 Second, the reasonable expectation of  
11 Highland as the promisor was to induce action or  
12 forbearance on the part of Daugherty as promisee.

13 In briefing, Highland says the  
14 statements were not directed to Daugherty, "... but  
15 rather [to] the jury, the judge, legal counsel, the  
16 public, and so forth." That's a quote from page 20 of  
17 Highland's reply. It simply makes no sense to say  
18 that the statements were directed to everyone else  
19 involved in the legal proceeding -- indeed, in the  
20 world by virtue of including "the public" -- but not  
21 Daugherty, who had the greatest interest in that  
22 proceeding. It is reasonably conceivable the  
23 reasonable expectation of someone discussing the  
24 escrow agreement, as Highland did, would have been to

1 induce action or forbearance by their adversary in the  
2 litigation.

3 Third, it is reasonably conceivable  
4 that Daugherty reasonably relied on the promise and  
5 took action to his detriment.

6 Daugherty could have pursued other  
7 strategies if the escrow was not in place. Daugherty  
8 paid a judgment in the same case to Highland, which he  
9 alleges was in the amount of \$3.2 million. If  
10 Daugherty knew what would happen with the escrow, he  
11 could have fought tooth and nail for an offset of the  
12 judgment amounts.

13 Highland focuses on the availability  
14 of a triangular offset in this situation, asserting  
15 that even if HERA owed Daugherty money, Daugherty was  
16 legally unable to offset the judgment he owed Highland  
17 by what he was owed from HERA. I think that misses  
18 the point, which is that Daugherty forewent even  
19 trying to obtain the offset, and bringing the issue to  
20 the attention of the Texas court.

21 He could have argued for other  
22 provisions in the final judgment, but he didn't. He  
23 paid his judgment and expected HERA and Highland would  
24 do the same as set forth in the escrow agreement.

1 Other members of this court have  
2 adopted a "no-chumps policy," meaning that good guys  
3 should not feel like chumps for following the rules.  
4 Daugherty played the game straight, and alleges  
5 Highland and HERA didn't. It is at least reasonably  
6 conceivable that Daugherty pursued the strategy he did  
7 because of the promises Highland made during the  
8 course of the litigation.

9 And that reliance was reasonable.  
10 Highland says Daugherty should have expected the worst  
11 because the language of the escrow agreement allowed  
12 the escrow agent to resign at any time, and so it was  
13 never a sure thing that the assets would be available  
14 to Daugherty.

15 In its reply, Highland says there was  
16 never any promise "... that the Escrow Agreement would  
17 never be terminated or that the Deposit Assets would  
18 never be transferred back to Highland ...." That  
19 reflects a dim view of the world, the way adversaries  
20 should evaluate the representations and promises made  
21 during litigation, and how the people making those  
22 promises should conduct themselves. Daugherty has  
23 adequately pled it was reasonable for him to rely on  
24 the statements he's identified.

1 Fourth and finally, it is reasonably  
2 conceivable that the promise is binding because  
3 injustice can be avoided only by enforcement of the  
4 promise.

5 Daugherty has made the point that  
6 Highland walked away from the Texas litigation with  
7 the benefit of both judgments. It received the assets  
8 supposedly held in escrow to satisfy the judgment for  
9 Daugherty, and it received payment from Daugherty to  
10 satisfy the judgment against him.

11 Black's Law Dictionary defines  
12 "injustice" as "an unjust state of affairs;  
13 unfairness." As myself and Vice Chancellor Glasscock  
14 have indicated, Daugherty's allegations raise serious  
15 concerns over the fairness of how things played out in  
16 Texas. It may be that the only way to avoid injustice  
17 is to enforce the promises.

18 It is not fatal to Daugherty that he  
19 has pled alternative theories of relief. Our Rule 8  
20 allows it, and our Supreme Court has blessed doing so  
21 for promissory estoppel in the *Chrysler v. Chaplake*  
22 *Holdings* case. At the pleadings stage, those  
23 alternative theories of relief can go forward.

24 Highland also claims promissory

1 estoppel is not needed to prevent injustice because  
2 the alleged promises are incorporated within the  
3 escrow agreement, an enforceable contract. But  
4 Daugherty is not a party or a third-party beneficiary,  
5 and so cannot sue under the contract's terms. For  
6 those reasons, the motion to dismiss is denied.

7 Mr. Katz, any questions?

8 MR. KATZ: No, Your Honor.

9 THE COURT: Anything from you,  
10 Mr. Uebler?

11 MR. UEBLER: No, Your Honor.

12 THE COURT: I'd like to, then, talk  
13 about how we're going to get the summary judgment  
14 briefing done in time for trial and in time for me to  
15 have a minute to think about it.

16 MR. KATZ: Your Honor, we conferred --  
17 my colleague conferred with Mr. Uebler this morning.  
18 I think we've worked out a schedule.

19 THE COURT: How long does that  
20 schedule leave me to think about it?

21 MR. UEBLER: Let me take a stab at  
22 this, Your Honor, and see if it makes any sense to  
23 you. So it's my understanding that the defendants are  
24 going to cross-move, or Highland -- it's a claim

1 against Highland. Highland will cross-move for  
2 summary judgment, and we will receive an answering  
3 brief/opening brief by June 14th. We'll reply by  
4 June 28th. And then looks like July 17th will be the  
5 final brief.

6 And I'm sure I speak for all the  
7 parties when I say we have no intention of imposing a  
8 burden on the Court to resolve that motion prior to  
9 trial. I think -- at least my view, and Mr. Katz and  
10 Mr. Reed can chime in -- we don't necessarily need to  
11 resolve the summary judgment/indemnification claim  
12 before trial because there's really not that much, if  
13 any, issue of fact to try regarding indemnification.

14 I would propose that we resolve on the  
15 papers, when the Court's able to do so, the issue of  
16 entitlement. And then, to the extent there's an issue  
17 of allocation or reasonableness, we can get together  
18 and propose something similar to Vice Chancellor  
19 Laster's *Fittracks* opinion. That was an advancement  
20 case, but I would envision something similar here.

21 So we're working in parallel and not  
22 burdening anybody prior to trial on those issues.

23 THE COURT: Anything to add?

24 MR. KATZ: No, Your Honor.

1 THE COURT: All right. That works for  
2 me, then, especially with the logical conclusion that  
3 this can just kind of float in parallel to the real  
4 merits issues to be handled at trial.

5 Anything else that we need to discuss  
6 today while we're all together?

7 MR. KATZ: Not from our side.

8 THE COURT: We pretty much handled  
9 every aspect of the case today. Thank you, all, for  
10 your presentations, they were helpful. And we'll be  
11 in touch.

12 We're adjourned.

13 (Court adjourned at 4:33 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 96 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 3 through 19 and 84 through 94 which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of May, 2019.

*/s/ Karen L. Siedlecki*

-----  
Karen L. Siedlecki  
Official Court Reporter  
Registered Merit Reporter  
Certified Realtime Reporter